

Rauf (Migration) [2021] AATA 478 (14 February 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Ali Rauf
VISA APPLICANTS:	Mrs Sadiqa Khatoon Mr Imran Ali Miss Madiha Fatima Miss Narjis Khatoon Mr Muhammad Hassnain
CASE NUMBER:	2009206
DIBP REFERENCE(S):	BCC2019/2447383
MEMBER:	Donna Petrovich
DATE:	14 February 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211(2) of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations • The Tribunal affirms the decision not to grant the secondary applicants a Subclass 309 (Partner (Provisional)) visa.

Statement made on 14 February 2021 at 12:55pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – validity of marriage – arranged marriage – married by Nikah in tribal tradition – Marriage Registration Certificate – Family Registration Certificate – financial aspects – limited financial support or sharing – cultural differences – nature of household – social aspects – nature of commitment – decision under review remitted

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – member of the family unit – father-in-law – sister-in-law – brother-in-law – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.12; Schedule 2, cls 309.211, 309.221, 309.311

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 May 2020 to refuse to grant the visa applicants' Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
3. The primary visa applicant applied for the visa on 8 May 2019 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309. The criteria for the grant of this visa are set out in Subclause 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The secondary applicants included in the application are the review applicant's father, two sisters, and brother. As the delegate found that the primary visa applicant did not satisfy the primary visa criteria, the delegate assessed the secondary applicants against the primary criteria, and found that they did not satisfy these criteria for the grant of a Partner (Provisional) (Class UF) (Subclass 309) visa. The delegate did not provide reasons for this finding.
5. The review applicant appeared before the Tribunal on 8 December 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the primary visa applicant and witnesses Sayed Ashfaq Hussain and Syed Abrar Hussain, and representative Mrs Madhu Warnakulasuriya.
6. The Tribunal exercised its discretion to hold the hearing by video conference. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by video conference, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by video conference. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
7. The review applicant and visa applicant were represented in relation to the review by a registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration in relation to the primary visa applicant.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the sponsor and primary applicant are in a spousal relationship as defined by s.5F of the Act.

Whether the parties are in a spouse or de facto relationship

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The visa applicant told the Tribunal that there was an arranged marriage and that in her culture the woman wears a veil and is confined to the home, and after being introduced to her husband in 2018 they were married by Nikah, in Tribal tradition. Their marriage is the joining of two families and is arranged for life. The visa applicant provided a statement which provided a detailed account of cultural aspects of their relationship, lifestyle, living arrangements and her role in this marriage.
13. These traditions prevent wedding photos of husband and wife. The details of the visa applicant and sponsor's wedding were supported by witnesses and a statutory declaration from Shahid Hussain who gave evidence that he attended the wedding of the couple on 28 April 2018.
14. The Tribunal was provided with a wedding certificate and documentation of the Nikah ceremony. The applicant provided the Tribunal with a Marriage Registration Certificate which shows the date of marriage as 28 April 2018 which was issued on 10 December 2020 by the Government of Khyber Pakhtunkhwa, a provincial government of Pakistan. The applicants also provided a Family Registration Certificate, from the National data base and Registration Authority, showing the sponsor Ali Rauf as husband, the visa applicant Sadiqa Khatoon as wife and Minsa Ali as their baby. The applicants also provided a Birth Certificate for their daughter issued by the Government of Pakistan and naming them as the child's mother and father. Based on the evidence provided it is accepted that the Pakistani authorities recognise the marriage and as such the Tribunal accepts that the marriage is valid for the purposes of the Act. The Tribunal gives weight in favour of the applicant in this regard.
15. The Tribunal accepts that the couple were validly married by Nikah in the Tribal traditions associated with the North West of Pakistan where strict Tribal traditions are practiced. The couple have provided sufficient documentation from the Pakistani Government to determine that the marriage is valid for the purpose of the Act. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

16. Financial aspects of the relationship

17. The visa applicant explained at the hearing that she did not have her own bank account, and when asked if her husband sent her money she explained that all money was sent to her father-in-law which was used to support her and her daughter.

18. This was supported by a written statement provided to the Tribunal which explained that culturally women were not permitted to have their own bank account and that all assets are owned by the family elder. These assets are distributed upon his death to other family members.
19. In a statement provided to the Tribunal it was further explained that the applicant lives with her father-in-law, as is the tradition in this Tribal society. In the statement provided to the Tribunal it states that there are no residential addresses as everyone is known to one another, and there are no utility bills. The primary applicant explained that she wears a veil, works in the home and does not work outside the home, and derives no income of her own.
20. In a financial statement of transfer of money, it is shown that on 13 July 2020 the review applicant transferred \$1000 to his father. The review applicant works as a painter and currently lives in a shared house with friends. He explained that he wants to establish a house with his wife and child.
21. The visa applicant told the Tribunal that her husband paid for the wedding and when they were together that he paid for everything.
22. The Tribunal in considering the evidence and cultural differences, places some small weight in the applicant's favour on the basis that there appears to be limited financial support or sharing in this case. The Tribunal has taken into consideration the nature of the marriage and that the couple is living apart and that the primary applicant is living in a Tribal society with her husband's family and the need for material items or financial exchange is less relevant in this circumstance.

23. Nature of the household

24. The Tribunal accepts the explanation of the applicant regarding cultural differences of North West Pakistan where strict Tribal traditions are practiced, and as the couple have only lived together for short periods of time initially after their wedding for four months and then 12 months later in 2019 for a period of five months. During these periods of time they have lived in the review applicant's father's home in a very traditional way, where the wife takes care of household duties, and cooking and all domestic duties.
25. When asked about this at the hearing, the couple both told the Tribunal of their desire to live together in their own home in Australia with their daughter. They have modest plans for the future and spoke of renting their own home and their desire to live together and look after their daughter. In considering this the Tribunal accepts this evidence based on the applicant's explanation of cultural difference and their clear desire to be together, and therefore places some small weight in favour of the applicant.

26. Social aspects of the relationship

27. The Tribunal heard that the couple were married as part of an arranged marriage between their families. They originally met in 2011 and were married in a traditional ceremony which took place in the Kurram in Pakistan where their families live. The wedding ceremony was attended by 300 people and was paid for by the sponsor. It is tradition for the bride and groom to not sit with each other and no photos are taken because of tradition and culture.
28. The Tribunal heard that it is acknowledged by the wedding that two families are united and that they are married for life. The Tribunal heard from witness Syed Abrar Hussain that he had known the sponsor and visa applicant since 2007, and that they are very much in love and now have a baby daughter and that it is recognised with arranged marriages that the whole family is involved.

29. Another witness Sayed Ashfaq Hussain told the Tribunal at the hearing that he has known the sponsor from his home country, and that they had been in detention together in Western Australia. He told the Tribunal that the applicant and his family love this girl. He appeared to provide evidence at the hearing and told the Tribunal that he shares a house with the applicant and that he is on the phone or WhatsApp every day for hours talking to her. The Tribunal accepted that the evidence provided by this witness was genuine and demonstrated the mutual commitment that the review applicant and the primary applicant have for each other which is supported by their family and friends. The Tribunal places weight in favour of the applicant in this regard.

30. The Tribunal accepts that the couple are living in different countries and that the visa applicant is living in a traditional community where some of the generally accepted social norms of western society would place emphasis on social activities in a different way to those accepted in this traditional community. Therefore, the Tribunal is unable to place weight in favour of the applicant in this regard.

31. Nature of their commitment

32. The couple both expressed to the Tribunal the difficulties experienced by them because of their separation. As the applicants are currently living in separate countries and the applicant currently resides in a shared house with friends and the visa applicant lives with the applicant's father and his children in Pakistan and takes care of the children and housekeeping as well as looking after her own baby, the usual assessment of a household is difficult to apply.

33. The evidence provided to the Tribunal of the nature of their commitment, was convincing and compelling in relation to their desire to be together as husband and wife, they explained to the Tribunal that their commitment to each was for life and significant in their culture because it was the union of two families, and that they expressed a mutual commitment to each other mutual commitment and provided convincing testimony that their relationship was genuine and continuing. The Tribunal considers the length of time that the

34. It is difficult to assess these circumstances, except in the context of the brief time that the couple has lived together in Pakistan where they told the Tribunal that the applicant took care of all the household duties. They both spoke of their desire to live together and raise their baby in Australia. The visa applicant told the Tribunal that it is very difficult for her and that she is unable to sleep and does not feel well. She told the Tribunal of her plans for the future, that she and her husband would like to live together with their five-month-old daughter.

35. The sponsor told the Tribunal that he currently shares a house with friends, but would like to rent a house for him and his wife and daughter, that the separation has been very difficult for him, that he does not sleep well, and that he loves his wife and daughter and does not want to be separated from them any longer. In considering the evidence, the Tribunal finds that the couple have a mutual commitment to each other and the relationship is longstanding. The Tribunal heard that the couple had known each other since childhood, and although they have been unable to live together for extended periods as a result of their circumstances they have maintained a mutual commitment to each other. the relationship appears to be genuine and they have maintained their relationship for more than two years and now have a child together.

36. The Tribunal was provided with a Government of Pakistan Certificate of Child which names Ali Rauf as the father and Sadiqa Khatoon as the mother of Minsa Ali, who was born on 16 July 2020.

37. The Tribunal in considering the submissions made by the visa applicant and sponsor finds that the family is suffering because of their separation and that the applicant is living apart from her husband, without his support in raising their child, and considers that for the welfare of the child and mother it is appropriate under these circumstances that significant weight be placed in favour of the visa applicant.
38. Therefore, whilst the couple currently do not live together, they do present as having a genuine and continuing relationship established through an arranged marriage, they have maintained their relationship, and are the parents of a child together. On this basis the Tribunal is prepared to place weight in favour of the applicant.
39. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
40. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
41. The secondary applicants named in the application are the review applicant's father, Mr Ali Imran, the review applicant's sisters, Miss Madiha Fatima and Miss Narjis Khatoon, and the review applicant's brother Mr Hassnain Muhammad.
42. Subclass 309 requires a secondary applicant to be a member of the family unit of a person who satisfies the primary criteria – that is, in this case, the visa applicant. The definition of 'member of the family unit' can be found in r.1.12 of the Regulations and encompasses persons who are either a spouse or de facto partner of the family head (in this case, the visa applicant), or are a child or step-child of the family head or of a spouse or de facto partner of the family head.
43. As the secondary applicant Mr Imran Ali is the primary visa applicant's father-in-law, he is not a member of the family unit of the family head.
44. As the secondary applicant Miss Madiha Fatima is the primary visa applicant's sister-in-law, and neither the primary visa applicant's nor the review applicant's child, step-child or dependent, she is not a member of the family unit of the family head.
45. As the secondary applicant Miss Narjis Khatoon is the primary visa applicant's sister-in-law, and neither the primary visa applicant's nor the review applicant's child, step-child or dependent, she is not a member of the family unit of the family head.
46. As the secondary applicant Mr Hassnain Muhammad is the primary visa applicant's brother-in-law, and neither the primary visa applicant's nor the review applicant's child, step-child or dependent, he is not a member of the family unit of the family head.
47. In reviewing the evidence provided in relation to the secondary applicants, including statements from the doctor and from the educational provider, the Tribunal does not place weight in this regard.
48. The Tribunal is not satisfied that the secondary applicants are members of the family unit of the primary visa applicant as prescribed in the Act and Regulations and therefore do not meet the criteria 309.311.
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

50. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the primary visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211(2) of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

The Tribunal affirms the decision not to grant the secondary applicants a Subclass 309 (Partner (Provisional)) visa.

Donna Petrovich
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).